No. 12624

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Trustee of the Estate of EUGENE C. BRISBANE, Individually, and BRISBANE & COMPANY, a Limited Partnership, Bankrupts,

Appellant,

vs.

CONSOLIDATED LIQUIDATING CORPORATION and UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEE, UNITED STATES OF AMERICA.

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BRIEF OF APPELLEE, UNITED STATES OF AMERICA.

I.

STATEMENT OF JURISDICTION.

The United States District Court had jurisdiction pursuant to Title 11, U. S. C., Section 11(10). The order of the Court below reversing the Referee's Order of April 12, 1949, was entered May 26, 1950 [Tr. 69]. Notice of Appeal was filed on June 14, 1950 [Tr. 70].

This Court has jurisdiction of the appeal under Section 47(a) of Title 11, U. S. C.

II.

STATUTORY PROVISIONS INVOLVED.

Sections 51 and 52, Title 41, U. S. C., commonly referred to as the Anti-Kickback Act, are set forth in the Appendix hereto.

Section 113(b) of Title 41, U. S. C., part of the Contract Settlement Act controlling the termination of war contracts provides:

> "Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—
>
> (1) appeal to the Appeal Board in accordance with subsection (d) of this section; or
>
> (2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of Section 41 of Title 28, except that, if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to sections 601-617 of Title 15, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law."

III.

STATEMENT OF THE CASE.

Appellant in its Jurisdictional Statement (App. Br. 2-3) has adequately described the procedural steps below, and the Brief of Appellee, Consolidated Liquidating Corporation (hereinafter referred to as "Consolidated") contains an accurate and sufficiently complete statement of the pertinent facts and of the principal issues presented. The material there set forth is therefore adopted by this Appellee.

In an effort to avoid undue repetition, it is our purpose to devote this brief on behalf of the United States, so far as practicable, to matters and authorities not fully covered in the brief submitted by Consolidated. The brief of Consolidated necessarily deals with the same issues with which we are concerned and we therefore adopt and approve it in all respects, and respectfully request it be deemed a part of this brief to the extent applicable.

IV.
ARGUMENT.

A. The District Court Was Correct in Reversing the Order of April 12, 1949, Entered by the Referee in Bankruptcy, as Void for Want of Jurisdiction.

The Bankruptcy Court was without jurisdiction to determine the Trustee's claim to the property here involved and to enter the order of April 12, 1949, for at least two reasons, over and above the unliquidated nature of that part of the fund representing contract termination claims: (1) The proceedings were and are in effect a suit against the United States which Congress has not authorized to be brought; and (2) None of the elements permitting summary adjudication by a bankruptcy court of rights and claims to property was present. On either ground, the order of the Bankruptcy Court was void for want of jurisdiction and was correctly reversed by the District Court.

1. The Proceedings in the Bankruptcy Court Constitute an Unauthorized Suit Against the United States.

By virtue of the cost-reimbursable nature of the contracts existing between Consolidated and the United States any sums which Consolidated would be required to pay to the Trustee in Bankruptcy, would necessarily be paid by the United States. As soon as Consolidated would make payment of the claims here involved, the United States would become obligated to make like payment to Consolidated. It is thus apparent that any claim upon Consolidated, in the instant case, is in fact and in sub-

stance a claim upon the property and monies of the United States.

> "A proceeding against property in which the United States has an interest is a suit against the United States * * *."
>
> *Minnesota v. United States,* 305 U. S. 382, 386.

See also:

> *The Siren,* 7 Wall. (74 U. S.), 152 153-154;
>
> *Carr v. United States,* 98 U. S. 433, 437-8;
>
> *United States v. Alabama,* 313 U. S. 274, 282.

The same holds true where a judgment or order granting the relief sought would necessarily affect the property interest claimed by the United States.

> *Louisiana v. McAdoo,* 234 U. S. 627;
>
> *Oregon v. Hitchcock,* 202 U. S. 60.

It is axiomatic that such suit can only be maintained where there exists an express statutory waiver of the Government's immunity (*The Siren,* 7 Wall. 152, 153-154; *United States v. Sherwood,* 312 U. S. 584, 586; *Goldberg v. Daniels,* 231 U. S. 218, 221, 222), and there is no statute which vests jurisdiction over suits against the United States in courts of bankruptcy.

> *United States v. U. S. Fidelity Co.,* 309 U. S. 506, 512-514.

Accordingly, the Bankruptcy Court was without authority to make the order here involved. Said order, if sustained, would in reality be an order upon the Treasury of the United States. No statutory authority exists which permits such a suit against the United States. The Peti-

tion to Intervene filed by the United States, contrary to Appellant's contention (App. Br. 17), does not alter this situation and has no effect upon it. The sovereign immunity from suit is not waived and, indeed, cannot be waived, by such intervention. Intervention is frequently necessary, as in the instant case, so that the jurisdictional and other objections of the United States to a proposed proceeding may be fully and adequately presented to protect the Government's interest [Tr. 19-21].

2. The Proceedings in the Bankruptcy Court Constitute an Improper Exercise of Summary Jurisdiction.

The Supreme Court has enunciated the only factors which can give a court of bankruptcy jurisdiction to adjudicate, in a summary proceeding, rights and claims to property. Such jurisdiction exists only if (1) the property is in the actual or constructive possession of the bankruptcy court, or (2) the adverse claim is merely colorable or frivolous, or (3) the person asserting the claim adverse to the Trustee consents to its adjudication in the bankruptcy court. The corollary of this proposition is that if a person raises an objection to a summary proceeding with respect to property not in the bankruptcy court's possession, and his claim thereto is "substantial and ingenuous," the claimant is entitled to have the merits of the claim determined in a plenary suit, and not summarily.

These principles are announced in *Cline v. Kaplan,* 323 U. S. 97. The Supreme Court there said (323 U. S., at 98-99):

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson v. Magnolia Co.,* 309 U. S. 478, 481. If

> the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' *Galbraith v. Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. *Harrison v. Chamberlain,* 271 U. S. 191, 194. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. *Louisville Trust Co. v. Comingor,* 184 U. S. 18, 25-26. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. *McDonald v. Plymouth County Trust Co.,* 286 U. S. 263."

In the instant case it is abundantly clear that even at the time the bankruptcy proceedings were instituted, and plainly when the Trustee's petition for an order to show cause was filed (1) the disputed property was not actually or constructively in the possession of the bankruptcy court; (2) the United States was asserting a substantial and *bona fide* claim of ownership of the property adverse to the Trustee in Bankruptcy [Tr. 61-64; 77-78]; and (3) that as such claimant the United States had not then, nor did it thereafter, actually or impliedly consent to a determination of title by the Bankruptcy Court, but, on the contrary, objected thereto prior to adjudication [Tr. 21-22].

(a) *The Bankruptcy Court Was Not in Actual or Constructive Possession of the Monies in Question.*

Prior to the filing of the Petition in Bankruptcy, the United States, pursuant to and in accordance with the provisions of Public Law 319, commonly and hereinafter referred to as the Anti-Kickback Act (41 U. S. C., Sec. 51), had directed the Consolidated Steel Corporation to withhold payments to the bankrupt herein [Tr. 61-64]. This direction prevented the creation of a fund in the usual sense. By this direction the United States prevented Consolidated Steel Corporation from creating a liability of the United States under Consolidated's cost-reimbursable contract with the United States.

Under these circumstances it cannot, in the first place, be said that there is or was a fund or property of which the bankruptcy court could be in actual or constructive possession. In addition, even assuming the existence of a fund in the usual sense of which possession could possibly be obtained, such fund, if in the possession of anyone, was, by virtue of its direction to withhold, actually or constructively in the possession of the United States.

(b) *The Adverse Claim Asserted by the United States Is Substantial and Bona Fide.*

We shall show hereinbelow that the claim of the United States to the monies in question derived from the provisions of the Anti-Kickback Act was valid against the Trustee and that the Bankruptcy Court erred in deciding otherwise. But for the purpose of the jurisdictional issue here raised it is sufficient that the claim of the United States was substantial and not merely "colorable or frivolous" (*Cline v. Kaplan,* 323 U. S. 97, 99). The claim of the United States to the monies involved is based

upon the provisions of the Anti-Kickback Act, a duly enacted, approved, and existing statute of the United States. Surely, under these circumstances, it cannot be said that the claim of the United States is in any sense frivolous or merely colorable.

(c) *The United States Did Not Consent to the Exercise of Jurisdiction by a Court of Bankruptcy.*

There is likewise absent here the only remaining basis for an exercise of summary jurisdiction to determine summarily the validity of an adverse claim to property—consent by the adverse claimant to such an adjudication. *Cline v. Kaplan,* 323 U. S. 97, 99. According to the *Cline* decision, such consent

> "may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit * * * may be waived by failure to make timely objection" (323 U. S., at p. 99).

It is clear, however (1) that the bankruptcy court cannot infer consent to its jurisdiction where the United States is the adverse claimant, and (2) that in the circumstances of this case no waiver of the right to a plenary suit could be inferred even were a private litigant involved, as in *Cline v. Kaplan.*

(1) Only Congress Can Waive or Authorize Waiver of a Jurisdictional Defect.

As we have shown, the proceedings complained of constitute a suit against the United States to which Congress has not consented. It is clear that in the absence of an authorizing statute, the Government's immunity

from suits cannot be waived by acts or omissions of its officials.

United States v. U. S. Fidelity Co., 309 U. S. 506, 513;

Minnesota v. United States, 305 U. S. 382, 388-9;

Munro v. United States, 303 U. S. 36, 41;

Finn v. United States, 123 U. S. 227, 232-233;

Carr v. United States, 98 U. S. 433, 438;

Case v. Terrell, 11 Wall. (78 U. S.), 199, 202;

Otis Elevator Co. v. United States, 18 Fed. Supp. 87, 89 (S. D. N. Y. 1937);

United States v. Turner, 47 F. 2d 86, 88 (C. C. A. 8, 1931).

(2) There Was Timely Objection to the Adjudication by the Bankruptcy Court.

Apart from the sovereign status of the United States, it is clear that the Government made timely objections to the Bankruptcy Court's jurisdiction. Thus, Paragraph II of the Objections of United States to the Order to Show Cause duly filed in the instant proceedings at the outset of the hearing on the Order to Show Cause, recites in pertinent part [Tr. 22]:

> "That the United States of America, prior to the institution of the within bankruptcy proceedings, had asserted a substantial and bona fide claim of ownership of the property involved adverse to the claim now asserted by the Trustee in Bankruptcy; that as such claimant the United States had not then, nor has it thereafter actually or impliedly consented to a determination of title thereto by the Bankruptcy Court but, on the contrary, has consistently objected thereto and now so objects; that the disputed property

> was not, and is not now, actually or constructively in the possession of the Bankruptcy Court; that the issue of title to and ownership of said monies cannot properly be determined adversely to the United States in a summary proceeding by this Court, but can only be properly determined in a plenary proceeding duly authorized and filed in a court having jurisdiction; . . ."

The established rule recognizes the sufficiency and timeliness of objections to the exercise of summary jurisdiction if they are raised at any time prior to the entry of a final order.

Cline v. Kaplan, 323 U. S. 97, 99, 100;

Louisville Trust Co. v. Comingor, 184 U. S. 18, 26;

Galbraith v. Vallely, 256 U. S. 46, 49;

In re Gold Medal Laundries, 142 F. 2d 301, 302 (C. C. A. 7, 1944);

In re Bergstrom, 1 F. 2d 288, 290 (C. C. A. 7, 1924);

In re White Satin Mills, Inc., 25 F. 2d 313, 314-315 (D. Minn., 1928).

Since the Government's objections to the jurisdiction of the bankruptcy court were raised prior to the entry of any final order, it was timely under these authorities.

Appellant urges that the Referee in Bankruptcy had the power to inquire into his own jurisdiction (App. Br. 9-11). This is not disputed. It is the Referee's conclusion, after such preliminary inquiry, that he had summary jurisdiction under the facts of the instant case, which is, and from the outset has been disputed. Nor do the authorities cited by Appellant aid him (App. Br. 18-22). Singularly, the lead-

ing case on the subject of summary jurisdiction of a court of bankruptcy, namely, *Cline v. Kaplan,* 323 U. S. 97, is nowhere mentioned or referred to in Appellant's Brief, although the District Court relied principally upon that decision in reversing the Referee's order of April 12, 1949.

In re Captaine, 31 Fed. Supp. 312 (E. D. N. Y., 1940), (App. Br. 18) deals with a factual situation bearing no relation to that present in the instant cause. There the Court held that the bankruptcy court had summary jurisdiction over certain funds because a purported assignment by the bankrupt to a creditor of these funds due the bankrupt from a third party provided that the creditor was not to notify the third party of the assignment unless the bankrupt failed to meet a note at maturity. This provision rendered the assignment void as against the Trustee in Bankruptcy, gave control of the funds to the bankrupt, and hence summary jurisdiction to the bankruptcy court. None of the controlling factors present there are present in this case.

The statement of the Court in *In re Goldman,* 5 Fed. Supp. 973, 974 (S. D. N. Y., 1933) (App. Br. 19), demonstrates the absence of any similarity between that case and this: "The case then is one where property was held in escrow for the bankrupt at the time when the petition was filed and where subsequently other persons commenced a suit in the state court setting up an equitable right to the property as against the bankrupt." In the instant case, there was no escrow, no money being held for the bankrupt at the time the petition was filed and no suit based upon equitable rights. On the contrary, at the time the petition in bankruptcy was filed the fund, if any, was being held for the United States, whose claim was based upon the express terms of an existing statute.

Lahey v. Trachman, 130 F. 2d 748 (C. C. A. 2, 1942) (App. Br. 20), dealt with a refund of certain assessments under local law by the City of New York. The Court pointed out that the (p. 749) "interpretation of the law is the substantial issue in the case." Once the Court determined that the bankrupt was the person entitled to receive the refund check under the particular terms of the local law, control of the money passed to the bankrupt. With such control in the bankrupt, the bankruptcy court acquired summary jurisdiction to determine adverse claims to the money. For the reasons adverted to by the District Court in its opinion and those set forth in this brief control of the monies here involved never passed to the bankrupt.

In re Engineers Oil Properties Corporation, 72 Fed. Supp. 989 (S. D. N. Y., 1947), is wholly unlike the case at bar. There the Texas company appeared as a disinterested stake holder claiming no beneficial interest in the monies either for itself or anyone else. Consolidated has not taken this position. Moreover, there the principal objection raised was that the overriding royalty interest was an interest in land under Texas law and that the bankruptcy court was therefore without jurisdiction over the subject matter.

In view of the foregoing the District Court in reversing the Referee's order of April 12, 1949, properly concluded that [Tr. 69]:

> ". . . both Consolidated and the United States are entitled to have their rights adjudicated in suits of ordinary character with the rights and remedies incident thereto, unless they have both consented to the summary jurisdiction of the Referee. The United States saved consent by timely objection. The record is not here which shows Consolidated's response, but it is indicated in the briefs that Consolidated also ob-

jected to the jurisdiction and did not consent. But whether the latter is true or not, *the United States, being the adverse claimant to the ultimate right to the money, and having made such objection, removes the whole matter from the summary jurisdiction of the Bankruptcy Court.*" (Emphasis supplied.)

B. The Anti-Kickback Act Is Valid and Constitutional and Has Been Fully Complied With by the United States.

The Referee in Bankruptcy, in order to arrive at the conclusion contained in his order of April 12, 1949, was required, despite statements disclaiming such an intention [Tr. 101, 57] to hold the Anti-Kickback Act unconstitutional, for it is upon this statute that the Government's bona fide claim to the monies in question is based. This statute, in terms, stands squarely in the path of the Referee's decision.

The Referee took three positions with respect to the Anti-Kickback Act:

(1) That the statute represents an unauthorized exercise of Congressional authority and is unconstitutional for the reason that no method is provided in said legislation whereby the rights of creditors of a subcontractor who has violated the statute may be determined [Tr. 55];

(2) That the United States has not complied with the provisions of the statute [Tr. 55]; and

(3) That the statute has no application in view of the segregation order of December 22, 1947, of the Bankruptcy Court [Tr. 56-7].

None of these positions, it is respectfully submitted, was well taken.

1. The Anti-Kickback Act Is Valid and Constitutional.

The constitutional objection raised by the Referee is stated in the Certificate as follows [Tr. 55]:

> ". . . the statute itself does not provide any court or forum wherein creditors of the sub-contractor involved could present their claims in order to determine whether or not the Government was validly acting pursuant to the provisions of the Anti-Kickback Act, and other related questions. In other words, the statute itself does not appear to be sufficiently implemented to meet the constitutional provisions involving due process of law."

If this is taken to mean simply that the statute does not specifically designate a particular tribunal for the determination of controversies arising under the statute, then the contention is wholly without merit, for there are countless statutes duly and validly enacted by Congress, creating rights and powers in the Government which contain no such provision. What is probably meant is that the statute affords no remedy against the United States to determine the validity of its withholding action authorized by the statute.

It is well established that a sovereign need not provide either judicial or administrative remedies against itself. It requires no citation of authority to show that in numerous situations today and in the past situations arise in which individuals would have a claim which they could litigate if it were against an individual, but which they are powerless to assert because it is against the United States. Prior to the enactment of the Federal Tort Claims Act (28 U. S. C. 921) the United States could not be sued directly for injuries arising out of the negligence of its employees.

Prior to the enactment of the Tucker Act the United States could be sued upon contract claims only in the Court of Claims in Washington, D. C. Even under the Tucker Act the jurisdiction of the United States District Courts is limited in suits of this character (28 U. S. C. 1346), and before the enactment of the Court of Claims Act no suit upon contract could be brought against the United States unless within the purview of some special statute by which the United States consented to be sued. It is thus not unusual under our system of law that a person may be unable to find a forum for the assertion of a claim against the United States.

As the Supreme Court declared in the leading case of *Lynch v. United States,* 292 U. S. 571, 580-581:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. * * * 'The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' The rule that the United States may not be sued without its consent is all embracing.
>
> * * * * * * * *
>
> * * * For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. * * * The sovereign's immunity from suit exists whatever the

> character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress * * * and to those arising from some violation of rights conferred upon the citizen by the Constitution. * * *
>
> * * * When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. * * * It may limit the individual to administrative remedies * * * And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative tribunal."

To the same effect:

> *United States v. Babcock,* 250 U. S. 328;
>
> *Dismuke v. United States,* 297 U. S. 167;
>
> *Maricopa County v. Valley National Bank of Phoenix,* 318 U. S. 357.

It is apparent from the foregoing that the United States is not constitutionally required to provide a judicial or administrative remedy against itself. But this is not to be taken as in any way conceding that there is no judicial or administrative avenue open to the Trustee. What is clear, however, as the Court below held, is that the summary procedure of the bankruptcy court is, under the controlling decisions, not the appropriate course and cannot properly be utilized here.

2. The Requirements of the Anti-Kickback Act Have Been Fully Complied With by the United States.

The Certificate of the Referee declares [Tr. 55]:

> "It does not appear to the undersigned Referee that the provisions of the Anti-Kickback Act have been sufficiently complied with by the United States of America to entitle the Bankruptcy Court to determine that the United States of America has any adverse claim to the monies in question; . . ."

There is nothing in the Certificate to indicate in what respect, if any, the United States has failed to comply with the requirements of the statute. As a matter of fact, the requirements laid down in the Act are plain and direct, and, as the Record establishes, have been fully complied with by the United States [Tr. 61-64].

All that the United States is required to do in order to obtain the benefit of the set-off remedy given the United States by the statute is contained in the following provision:

> "Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor."

As the Record shows [Tr. 61-64], and as Paragraph V of the Referee's Findings of Fact declares [Tr. 49], both the contracting agency, namely, the United States Maritime Commission, on June 12, 1946, and the General Accounting Office, on May 19, 1947, "pursuant to the pro-

visions of Title 41, U. S. C., Sec. 51", directed Consolidated to withhold payment of the monies involved to the subcontractor, Brisbane & Company. This is what the statute requires, and this is what was done, the direction from the United States Maritime Commission coming almost a month before the commencement of the within bankruptcy.

3. The Segregation Order of December 22, 1947, Does Not Affect the Remedy Given the United States by the Anti-Kickback Act.

The Anti-Kickback Act gives the United States a direct and effective remedy against those who seek to cheat and defraud it by payments or "kickbacks" to persons in a position to award business ultimately paid for by the Government. The United States, since it is the one defrauded, is placed by the statute—and properly so—in a preferred position so that, if at all possible, it may be made whole. The Referee [Tr. 56-7] sought to escape entirely the operation of the statute and defeat the preferred position accorded the United States by Congress in this Act, by virtue of the segregation in the bankruptcy of the assets of Brisbane & Company, a limited partnership (in which Eugene C. Brisbane was the only general partner [Tr. 11]) from the assets of Eugene C. Brisbane personally, and relegating the United States to a claim upon the nonexistent personal assets of Eugene C. Brisbane. Appellant urges the same proposition (App. Br. 11-16). Neither the language nor obvious purpose and intent of the Anti-Kickback Act will permit the remedy there given the United States to be frustrated and defeated in this manner.

The Anti-Kickback Act provides that upon appropriate direction of the United States, the prime contractor is

required to withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor contrary to the statute. Appropriate direction was given the prime contractor, Consolidated Steel Corporation, directing the withholding from various subcontractors, *including Brisbane & Company,* amounts reported to have been paid by such subcontractors contrary to the Act. The appropriate direction having been given reporting the appropriate findings required to bring the withholding provisions of the statute into operation—and prior to the commencement of any bankruptcy proceedings whatever—it is apparent that a subsequent order in bankruptcy making a distinction for bankruptcy purposes between the assets of the limited partnership and of Brisbane individually, can have no effect upon the remedy given the United States by the statute.

Dispelling any vestige of doubt is the fact that the second section of the statute (41 U. S. C. Sec. 52), defining the various terms employed in the statute specifically defines "subcontractor" as any person, corporation, partnership, or business association of any kind, and defines "person" as any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual. The statute is all embracing and was designed to prevent the frustration of its purposes by any device distinguishing between individuals and various forms of business organization. Otherwise, how easy it would be to defeat the expressed intent of Congress by a simple distinction between an individual and the firm or company which he owns, or on whose behalf he acts. This is the use to which the segregation order of December 22, 1947, is attempted to be put and what the statute itself plainly prevents.

C. The Bankruptcy Court Was Without Jurisdiction to Direct the Payment of Unliquidated Termination Claims.

The order of April 12, 1949, directs Consolidated Liquidating Corporation forthwith to pay to George T. Goggin, as Trustee in the within bankruptcy proceeding, the sum of $26,484.29 [Tr. 50]. Of this sum $6093.47 derives from termination claims arising under two purchase orders held by Brisbane & Company [Tr. 49, 75-77]. But, as the Referee's Certificate [Tr. 54] itself expressly declares this total of the two termination claims is "subject to possible further processing" by the United States Maritime Commission. Paragraph II of the Referee's Findings of Fact upon which the order of April 12, 1949, was purportedly based also qualifies this alleged obligation as "subject to the possible requirement of the United States Maritime Commission of further processing . . ." [Tr. 49]. The order is therefore in conflict with the Findings of Fact upon which it is stated to be based.

It is thus plain that the order of April 12, 1949, was and is erroneous in that $6093.47 of the amount said order directs Consolidated Liquidating Corporation to pay to the said Trustee in Bankruptcy is not a liquidated amount owing by Consolidated Liquidating Corporation to the bankrupt, but, as said order shows on its face, is merely a tentative balance arising from the termination of certain purchase orders and is subject to the possible requirement of the United States Maritime Commission of further processing to determine the precise balance, if any. The determination of such balance is within the jurisdiction of the United States Maritime Commission, and is not within the jurisdiction of the Bankruptcy Court. (Section 13, Contract Settlement Act of 1944, 41 U. S. C. 113(b).)

Conclusion.

For the foregoing reasons the judgment of the District Court reversing the order of April 12, 1949, entered by the Referee should be affirmed.

Respectfully submitted,

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APPENDIX.

Sections 51 and 52, Title 41, U. S. C.

§51. *Fees or kick-backs by subcontractors on cost-plus-a-fixed-fee or cost reimbursable contracts; recovery by United States; conclusive presumptions; withholding of payments.*

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is hereby prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly

by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor. (Mar. 8, 1946, c. 80, § 1, 60 Stat. 37.)

§ 52. *Same; definitions.*

For the purpose of sections 51-54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a cost-plus-a-fixed-fee or cost reimbursable contract or of a subcontract entered into thereunder, and the term "person" shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual. (Mar. 8, 1946, c. 80, §2, 60 Stat. 38.)